84-1345 (1)

NO. .....

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In the Supreme Court of the United States

OCTOBER TERM, 1984

TOWN PUMP, INCORPORATED, a corporation,

Petitioner,

vs.

RAYMOND J. DONOVAN, Secretary of Labor
United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Ninth Circuit so far depart from the accepted and usual course of judicial proceedings as to constitute prejudicial error in its review of the trial court's decision?

A. Did the Ninth Circuit act improperly and in opposition to the position of other circuits in relying on the trial court's initial findings of fact and conclusions of law?

B. Did the Ninth Circuit usurp the trial court's function and act beyond its authority as an appellate court?

II. Did the Ninth Circuit's sweeping reversal of the trial court's decision, without considering the evidence as to each lessee, constitute error?

III. Is the standard for determining employee status within the meaning of the Fair Labor Standards Act so inconsistently and unpredictably applied, as evidenced by the Ninth Circuit's decision in this case, that it should be redefined?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
OPINIONS BELOW	1
GROUNDS FOR JURISDICTION OF THE UNITED STATES SUPREME COURT	2
STATUTES INVOLVED.....	2
STATEMENT OF THE CASE	2
ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI	7
I. The Ninth Circuit So Far Departed From The Accepted And Usual Course Of Judicial Proceedings In Its Review Of The Trial Court's Decision That Prejudicial Error Resulted To Town Pump	7
A. The Ninth Circuit Acted Improperly And In Opposition To The Position Of Other Circuits in Relying On The Trial Court's Initial Findings Of Fact And Conclusions Of Law	7
B. The Ninth Circuit Usurped The Trial Court's Function And Acted Beyond Its Authority As An Appellate Court	10
II. The Ninth Circuit's Sweeping Reversal Of The Trial Court's Decision, Without Considering The Evidence As To Each Lessee, Constituted Error	13

III. The Standard For Determining Employee Status Within The Meaning of the Fair Labor Standards Act Is So Inconsistently And Unpredictably Applied, As Evidenced By The Ninth Circuit's Decision In This Case, That It Should Be Redefined 15

CONCLUSION 21

APPENDIX A

Memorandum Opinion Of The Ninth Circuit A-1

Final Memorandum And Findings Of Fact And Conclusions Of Law Of The Trial Court A-3

Initial Memorandum And Order Of The Trial Court A-7

Initial Findings Of Fact, Conclusions Of Law, And Order Of The Trial Court A-11

Order Of The Ninth Circuit A-31

APPENDIX B

Fair Labor Standards Act of 1938

29 U.S.C. §203(d) B-1
29 U.S.C. §203(e)(1) B-1
29 U.S.C. §203(g) B-1

29 U.S.C. §215(a)(2) B-1
29 U.S.C. §215(a)(5) B-1
29 U.S.C. §216(c) B-2
29 U.S.C. §217 ..... B-3

28 U.S.C. §1291 ..... B-3
28 U.S.C. §1345 ..... B-4

TABLE OF AUTHORITIES

Cases:	Page
Aetna Life Insurance Co. v. Board of County Commissioners, 79 F. 575 (8th Cir. 1897)	8
Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983)	16
Bookman v. United States, 453 F.2d 1263 (Ct. Cl. 1972)	8
Castillo v. Givens, 704 F.2d 181 (5th Cir. 1983)	16
Cleo Syrup v. Coca Cola Co., 139 F.2d 416 (8th Cir. 1943), *cert. denied*, 321 U.S. 781 (1944)	11
Clinton Engines Corp. v. Briggs & Stratton Corp., 175 F. Supp. 390 (E.D. Mich. 1959)	8,9
Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984)	16,18
Donovan v. New Floridian Hotel, 676 F.2d 468 (11th Cir. 1982)	13
EEOC v. Zippo Manufacturing Co., 713 F.2d 32 (3d Cir. 1983)	19
General Casualty Corp. v. School District No. 5, 233 F.2d 526 (9th Cir. 1956)	11
Gilbreath v. Daniel Funeral Home, 421 F.2d 504 (8th Cir. 1970)	10
Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961)	17,18

Gulf Towing Co. v. Steam Tanker,
648 F.2d 242 (5th Cir. 1981) 12

Hickey v. Arkla Industries, Inc.,
699 F.2d 748 (5th Cir. 1983) 16

In re Rochester Sanitarium and Baths Co.,
221 F. 22 (2d Cir. 1915) 8

Indiana State Employees Association v. Negley,
501 F.2d 1239 (7th Cir. 1974) 11

Kelley v. Everglades Drainage District,
319 U.S. 415 (1943) 12

Mednick v. Albert Enterprises, Inc.,
508 F.2d 297 (5th Cir. 1975) 13

Meyer v. Missouri State Highway Commission,
567 F.2d 811 (8th Cir. 1977) 10

Mitchell v. Joseph,
117 F.2d 253 (7th Cir. 1941) 8

Nicholson v. Board of Education,
682 F.2d 858 (9th Cir. 1982) 12

Paul v. Petroleum Equipment Tools Co.,
708 F.2d 168 (5th Cir. 1983) 17

Rutherford Food Corp. v. McComb,
331 U.S. 722 (1947) 15,16

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 16

United States v. Benz,
282 U.S. 304 (1931) 8

United States v. Darby,
312 U.S. 100 (1941) 15

United States v. Jerry,
487 F.2d 600 (3d Cir. 1973) 8

United States v. Rosenwasser,
323 U.S. 361 (1945) 15

United States v. United States Gypsum Co.,
333 U.S. 364 (1948) 10,11,17

Walling v. Portland Terminal Co.,
330 U.S. 148 (1947) 16

Wynne v. Rochelle,
385 F.2d 789 (5th Cir. 1967) 8

Yanish v. Barber,
232 F.2d 939 (9th Cir. 1956) 12

Statutes:

Fair Labor Standards Act of 1938

29 U.S.C. §215(a)(2) 2

29 U.S.C. §215(a)(5) 2

29 U.S.C. §216(c) 3

29 U.S.C. §217 2,3

28 U.S.C. §1291 3

28 U.S.C. §1345 3

Rules:

Rule 52(a) of the Federal Rules of Civil Procedure 10,12,18

In the Supreme Court of the United States

October Term, 1984

No. .....

TOWN PUMP, INCORPORATED, a corporation,
Petitioner,

vs.

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

On October 6, 1981, the United States District Court for the District of Montana, Butte Division, Judge W. D. Murray, issued a Memorandum and Order and Findings of Fact, Conclusions of Law and Order. Case No. CV-78-31-BU.

On September 28, 1983, the United States District Court for the District of Montana, Butte Division, Judge W. D. Murray, issued a Memorandum and Findings of Fact and Conclusions of Law. Case No. CV-78-31-BU.

On August 27, 1984, the United States Court of Appeals for the Ninth Circuit issued a Memorandum Opinion. Case No. 83-4313.

These opinions were not designated for publication in either official or unofficial reporters.

GROUNDS FOR JURISDICTION OF THE UNITED STATES SUPREME COURT

The judgment of the Ninth Circuit Court of Appeals was filed and entered on August 27, 1984. On November 23, 1984, Defendant-Appellee Town Pump, Inc.'s timely petition for rehearing was denied by the Ninth Circuit, and this petition for certiorari was filed within ninety days of that date pursuant to Rules 17 and 20 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1) and 2101(c).

STATUTES INVOLVED

The pertinent text of the Fair Labor Standards Act of 1938, 29 U.S.C. §§201-219 is set forth in Appendix B.

STATEMENT OF THE CASE

Town Pump, Inc. is a Montana corporation which is engaged in, among other things, the wholesale and retail distribution of petroleum products. Throughout this case the designation "Town Pump" has been used to identify not only this corporation, but numerous corporations and entities owned by various members of the Thomas F. Kenneally family of Butte, Montana. For simplicity's sake, "Town Pump" will be used to refer to the defendant corporation and any related entities engaged in the conduct which is the subject of this lawsuit.

The United States Department of Labor ("DOL") brought this suit pursuant to §17 of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §217, to enjoin Town Pump from violating §§15(a)(2) and 15(a)(5) of the FLSA, 29 U.S.C. §§215(a)(2) and 215(a)(5), and to recover

unpaid minimum wages and overtime compensation for certain individuals who had entered into leases with Town Pump over the years. The district court had jurisdiction over the action pursuant to 29 U.S.C. §§216(c) and 217 and 28 U.S.C. §§1291 and 1345.

Town Pump, in its petroleum products business, was associated with approximately 50 different retail locations in the State of Montana. The nature of Town Pump's association with these retail locations varied over time and location. Over the years, retail marketing concepts regarding petroleum products have experienced considerable change, some of which affected the operations at issue. Self-service gasoline operations were converted into convenience stores or other businesses which also sold petroleum products at retail.

During the years in question, 1977 to 1982, Town Pump sold petroleum products at retail through its own store operations and also to and through lessee-operated retail businesses. Only the lessee-operated enterprises have been at issue in the lawsuit. In addition to selling petroleum products at retail, lessees engaged in businesses which varied considerably over the time period involved according to the facilities present and the interests of the lessees. Town Pump had no interest or investment in any of these businesses, other than to lease the premises and provide petroleum products for resale. The lessees earned profits from their businesses and were paid commissions from Town Pump for sales of petroleum products through the self-service pumps.

The DOL investigation covered a two-week period in April of 1977 during which it visited 16 locations. The Internal Revenue Service had previously conducted an extensive investigation into the nature of Town Pump's association with its lessees to determine whether a lessor/lessee relationship or an employer/employee relationship existed, and concluded that Town Pump was

not an employer of these individuals but that they were lessees of Town Pump. After its investigation, the DOL initially determined that, based on substantial investments in the store operations, two locations were operated by independent contractors. All other lessees were determined to be employees of Town Pump, regardless of the nature and extent of their businesses. Later the DOL agreed that another location was not operated by an employee but rather by an independent contractor.

The DOL filed the lawsuit in May of 1978. During the first trial in June of 1980, the DOL called two lessee witnesses and put in deposition testimony of four others. Town Pump was later allowed to submit the deposition testimony of three officers. In October of 1981, Judge Murray, the trial judge, made findings of fact and conclusions of law [1] and held that the six individual lessees involved in that trial were employees within the meaning of the FLSA. He further held that there was insufficient evidence to conclude that any lessees who had not testified were employees.[2]

In September of 1982 a second trial was held during which 51 lessees testified, some called by the DOL and some by Town Pump. Town Pump also put on testimony of management employees and expert witnesses. The DOL was seeking recovery for the lessees it called to testify as well as for all non-testifying lessees of approximately $2,000,000.00 in actual damages and $2,000,000.00 in liquidated damages. At this trial Judge Murray re-examined the findings as to the first six lessees in light of all the testimony and evidence presented at the two trials.

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[1] *Donovan v. Town Pump, Inc.*, No. CV-78-31-BU (D. Mont. 1981) Findings of Fact, Conclusions of Law and Order (fully set forth in Appendix A hereto) (hereinafter referred to as *Initial Opinion*).

[2] *Donovan v. Town Pump, Inc.*, No. CV-78-31-BU (D. Mont. 1981) (mem.) (fully set forth in Appendix A hereto) (hereinafter referred to as *Initial Opinion*).

On September 28, 1983, Judge Murray issued a final opinion and order in which he found that each of the lessees who testified (including the initial six) were independent contractors and not employees within the meaning of the FLSA.[3] His opinion contained several specific factual findings, including determinations of credibility of witnesses, and legal conclusions, which were in direct opposition to the findings and conclusions of the *Initial Opinion*. Judge Murray addressed certain, but not all, of the six factors enumerated in prior cases by the Ninth Circuit as being relevant to a determination of an individual's employment status under the FLSA.

On appeal the DOL did not allege that the factual findings of the trial court were clearly erroneous; instead, it essentially disregarded those findings and argued facts to the contrary. The DOL's position was that the district court misapplied the established legal test and did not consider all of the appropriate factors.

In its memorandum opinion, the Ninth Circuit agreed with the DOL that the trial judge failed to consider significant factors in determining the lessees' status.[4] The circuit court noted that such a case would normally be appropriate for remand for further findings of fact. In this instance, however, the appellate court chose not to remand, and did not deal with Judge Murray's findings of fact and conclusions of law rendered after the second trial. It relied on the initial findings of fact and conclusions of law which the trial judge had explicitly limited to six individuals, and which the trial judge later reversed, as the basis for ruling on all lessees who testified.

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[3]*Donovan v. Town Pump, Inc.*, No. CV-78-31-BU (D. Mont. 1983) (mem.) (fully set forth in Appendix A hereto) (hereinafter referred to as *Final Opinion*).

[4]*Donovan v. Town Pump, Inc.*, No. CV 78-0031 (9th Cir. 1984) (mem.) (fully set forth in Appendix A hereto) (hereinafter referred to as *Ninth Circuit Opinion*).

The Ninth Circuit held that all 57 lessees were employees of Town Pump within the meaning of the FLSA. It did not reconcile or account for the differences in the findings of fact made by Judge Murray after the two trials, nor did it explain why the findings of fact made after the second trial should not control. The Ninth Circuit did not state that it reviewed the voluminous record of testimony and documentation presented to the trial court in reaching its decision, nor did it address the trial testimony that showed significant variations in the nature of the business operations. In its opinion, the appellate court merely stated that "the district court's detailed findings of fact, made after the first trial, are sufficient for us to rule on the issue."[5]

Town Pump filed a timely petition for rehearing in the Ninth Circuit, arguing that the appellate court's reliance on the trial court's first order was error. Town Pump also argued that the Ninth Circuit improperly disregarded the factual bases of the district court's second order and should have reviewed those facts by the clearly erroneous standard. The DOL filed a brief in opposition to the petition for rehearing taking a position different from that in its appellate brief. In its appellate brief the DOL argued that the district court totally reversed itself in its second opinion, thereby acknowledging that the findings and conclusions in the *Final Opinion* were in direct contradiction to certain of those in the *Initial Opinion*. In its brief in opposition to rehearing, however, the DOL elected to climb aboard with the Ninth Circuit and asserted that the court had not set aside its *Initial Opinion* and that the original findings and conclusions remained legally viable. Without comment, the Ninth Circuit denied the petition for rehearing.

This case illustrates the remarkable result of an appellate court's disregard for the usual course of judicial proceedings, and it demonstrates the need for a clarifi-

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[5]*Ninth Circuit Opinion* at A-2.

cation of the standards under the FLSA. The findings of fact and conclusions of law made by a trial court after thorough consideration of evidence presented during twelve days of trial were rejected by the Ninth Circuit without any regard whatsoever. The original findings and conclusions which were superseded by the trial court's *Final Opinion* were adopted by the Ninth Circuit to apply to individuals who were not before the trial court at the first trial and whose business activities differed significantly from the initial six lessee witnesses.

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

I. The Ninth Circuit so far departed from the accepted and usual course of judicial proceedings in its review of the trial court's decision that prejudicial error resulted to Town Pump.

A. The Ninth Circuit acted improperly and in opposition to the position of other circuits in relying on the trial court's initial findings of facts and conclusions of law.

By essentially disregarding the findings in the trial court's *Final Opinion* and relying on the original findings of fact as the basis upon which to justify its holding, the Ninth Circuit gave effect to a nullity. Such action by an appellate court is totally without supporting authority and contrary to the position of other circuits. Moreover, because the DOL did not formally contest the trial court's final findings on appeal, nor argue that the initial findings should apply, the Ninth Circuit acted outside the scope of its appellate authority in disregarding the final findings and adopting the initial ones.

The rule is well established that a court has inherent power to amend, modify, or vacate an order, decree, or

judgment which it previously entered.[6] Reconsideration of a prior decision is often the sole means of correcting errors of procedure or substance, for example, where a new development or newly discovered evidence comes to light.[7] Where a court exercises this power, the prior status of the case is restored and the situation is the same as if the order or judgment had never been entered.[8] The order becomes a nullity, no rights can be considered as accruing from it, and findings of fact not included in the final findings or judgment cease to be part of the final order.[9]

Judge Murray exercised his authority to reconsider a prior decision when, after the second trial session, he re-examined the findings from the first session. In light of the comprehensive evidence presented by both sides at the second session, Judge Murray made totally new findings of fact which contradicted the findings of the *Initial Opinion*. For example, after the first trial the court found that Town Pump had complete control over every significant aspect of the business, and after the second trial the court found that Town Pump did not supervise the lessees or control the hours of operation. Judge Murray concluded after the second trial that none of the Town Pump lessees could be classified as employees within the meaning of the FLSA. Upon the entry of the

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[6] *United States v. Benz*, 282 U.S. 304, 306-307 (1931); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972); *Mitchell v. Joseph*, 117 F.2d 253, 255 (7th Cir. 1941); *In re Rochester Sanitarium & Baths Co.*, 222 F. 22, 26 (2d Cir. 1915); *Aetna Life Ins. Co. v. Board of County Commissioners*, 79 F. 575, 576 (8th Cir. 1897).

[7] *Bookman*, 453 F. 2d at 1265.

[8] *Wynne v. Rochelle*, 385 F.2d 789, 796 (5th Cir. 1967); *In re Rochester Sanitarium*, 222 F. at 26; *Aetna*, 79 F. at 576.

[9] *See United States v. Jerry*, 487 F.2d 600, 607 (3d Cir. 1973); *Clinton Engines Corp. v. Briggs & Stratton Corp.*, 175 F. Supp. 390, 391 (E.D. Mich. 1959).

final judgment, the initial findings of fact and conclusions of law ceased to exist.[10]

It is clear that Judge Murray acted properly: the additional evidence with which he was presented during the second trial provided him with a much more accurate picture of the lessees' situation than did the one-sided testimony of the first trial. Deference should have been accorded the trial judge's desire to reach the right result, a result which meant reversal of his earlier decision after consideration of additional evidence.

In its appeal to the Ninth Circuit, the DOL did not in any way suggest that Judge Murray's initial opinion should be revived or that it could be used to support a determination that all lessees at issue were employees of Town Pump. Moreover, it did not contest the findings of fact in the *Final Opinion*, but essentially ignored them. The Ninth Circuit also treated those findings in the *Final Opinion* as if they had no effect and then stepped beyond its appellate authority. Of its own accord, the Ninth Circuit used the trial court's initial findings of fact to support its holding that the Town Pump lessees were FLSA employees. Such an act is in direct opposition to the positions of the Second, Third, Fifth, Seventh, and Eighth Circuits, is a prejudicial departure from the accepted and usual course of judicial proceedings, and should be examined by this Court.

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[10] *Clinton Engines Corp.*, 175 F. Supp. at 391.

B. The Ninth Circuit usurped the trial court's function and acted beyond its authority as an appellate court.

1. The validity of factual findings was not an issue properly before the Ninth Circuit, and any review of factual findings which did take place should have been conducted with the appropriate degree of scrutiny.

By setting aside the findings of the trial court's final decision without having been asked to consider factual findings on appeal, and where underlying facts had been in dispute, the Ninth Circuit in effect conducted a *de novo* trial in contravention of basic principles of appellate review. Not only is a higher court limited to reviewing the issues raised, but it may not resolve factual controversies[11] nor may it set aside findings of fact in actions tried to the court unless it determines the findings to be clearly erroneous.[12]

A finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."[13] It is beyond the authority of the court of appeals to re-evaluate evidence presented to the trial court, and the reviewing court may not substitute its judgment for first-hand evaluation.[14]

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[11]*Gilbreath v. Daniel Funeral Home*, 421 F.2d 504, 510 (8th Cir. 1970).

[12]Rule 52(a) of the Federal Rules of Civil Procedure.

[13]*United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

[14]*Meyer v. Missouri State Highway Comm'n*, 567 F.2d 804, 811 (8th Cir. 1977) (Matthes, J., concurring in part and dissenting in part).

Full effect must be given to a trial judge's opportunity, which is denied to courts of appeals, to observe witnesses, judge their credibility, and draw inferences from their testimony.[15] In determining whether a sufficient evidentiary basis exists for the court's findings of fact, the appellate court must view the evidence and the inferences deductible therefrom in the light most favorable to the appellee.[16]

The Ninth Circuit should have limited its review to a determination of whether the trial court misapplied the law in concluding that Town Pump lessees were independent contractors. It did not do so. Moreover, in not dealing with the findings in the *Final Opinion*, the circuit court did not examine the trial court's findings in a light most favorable to Town Pump; it did not show deference to the court's determination of credibility of witnesses; it did not presume the trial court's findings to be correct; and it did not limit its role to determining whether the DOL had rebutted that presumption. Instead, the Ninth Circuit relied on those findings, which originally had been adopted by the trial court from those proposed by the DOL, but which were later rejected by Judge Murray. In so doing, the Ninth Circuit resolved factual controversies in total disregard of the limits of its appellate authority.

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[15]333 U.S. at 394; *General Casualty Co. v. School Dist. No. 5*, 233 F.2d 526, 528 (9th Cir. 1956).

[16]*Cleo Syrup Corp. v. Coca Cola Co.*, 139 F.2d 416, 417-18 (8th Cir. 1943), *cert. denied*, 321 U.S. 781 (1944); *Indiana State Employees Ass'n v. Negley*, 501 F.2d 1239, 1242 (7th Cir. 1974).

2. If the findings of fact in the trial court's final opinion were insufficient for proper review, the Ninth Circuit should have remanded the case for further findings.

The test as to the adequacy of a trial court's findings of fact is whether they are explicit enough on the ultimate issues to give the appellate court a clear understanding of the basis of the decision and to enable it to determine the grounds on which the trial court reached its decision.[17] A remand for appropriate findings is the normal procedure where a trial court has not fulfilled its duty under Rule 52(a) of the Federal Rules of Civil Procedure.[18] It is not the function of the appellate court to make findings of fact, nor should the reviewing court examine the evidence as an original fact finding tribunal.[19] An exception to the general rule requiring a remand for lack of findings arises where the record considered as a whole does not present a genuine issue as to any material fact.

The Ninth Circuit stated that a case such as this would generally be remanded for further fact findings,[20] indicating that it did not clearly understand the basis of the trial court's decision. The witnesses' testimony and Judge Murray's findings with regard to credibility show that many facts were in dispute and that the exception to the rule requiring remand was not applicable. Rather than sending the case back, the Ninth Circuit relied on factual findings which had been superseded by the trial court's *Final Opinion*. Such an action was equivalent to

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[17] *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 422 (1943); *Nicholson v. Board of Educ.*, 682 F.2d 858, 866 (9th Cir. 1982).

[18] *Gulf Towing Co. v. Steam Tanker*, 648 F.2d 242, 245 (5th Cir. 1981).

[19] *Yanish v. Barber*, 232 F.2d 939, 946-47 (9th Cir. 1956).

[20] *Ninth Circuit Opinion* at A-2.

acting as an original fact finding tribunal. It constitutes a departure from the usual course of judicial proceedings, causing prejudice to Town Pump and warranting review by this Court.

II. The Ninth Circuit's Sweeping Reversal Of The Trial Court's Decision, Without Considering The Evidence As to Each Lessee, Constituted Error.

The Ninth Circuit's decision to ignore all testimony and evidence introduced at the second trial and to rule on the status of all testifying lessees without looking at the evidence as to each individual conflicts with the law in other circuits.[21] Moreover, this error cannot be considered harmless. A review of the testimony of certain lessees clearly establishes that the Ninth Circuit's classification of these individuals as employees based solely on the trial court's *Initial Opinion* as to six lessees was clearly in error.

A glaring example of this error is shown in Mr. Earnest Franke's testimony at the trial in September of 1982. His uncontradicted testimony established that the premises he leased from Town Pump consisted of approximately half a city block containing three separate buildings and three islands for gasoline pumps. Mr. Franke maintained over $30,000.00 in inventory including groceries and automotive and sporting goods. At the time of trial he was in the process of installing an ice cream parlor, a video arcade and a tool rental and sales business. Although Mr. Franke entered into the written lease

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[21] *See, e.g., Donovan v. New Floridian Hotel*, 676 F.2d 468, 471 (11th Cir. 1982) (existence of employment relationship must be judged by economic realities of individual case); *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 302 n.6 (5th Cir. 1975) (test of economic reality goes to question of whether individual whose status is in question was in fact an independent businessman).

agreement with Town Pump, he purchased the business from the previous lessees. The purchase price included an amount for inventory as well as an amount in excess of $10,000.00 for the good will of the business. Mr. Franke also testified that he set his own hours of operation and hired employees at his own expense.

In addition to Mr. Franke's testimony, other lessees testified that they engaged in substantial businesses on the leased premises other than the sale of gasoline and that they did not share the profits from their businesses with Town Pump. Lessees engaged in such substantial and varied businesses as selling used cars, selling marine supplies, and providing surveying and trucking services, in addition to the sale of grocery and related store items. Town Pump was not involved in any of these independent ventures.

The district court heard the testimony and reviewed the documents pertaining to each individual before determining that individual's status under the FLSA. On the other hand, the Ninth Circuit failed to examine and comment upon the evidence in rendering its decision and merely relied on the findings with regard to the original six lessees to reverse the trial court. The circuit court's decision resulted in the granting of employment status to individuals not dependent for their livelihoods upon Town Pump. These improper classifications were achieved by the Ninth Circuit's sweeping reversal of the trial court's decision without proper consideration of the evidence as to each lessee, resulting in error.

By examining the evidence at the two sessions of trial, the district court made factual determinations which led to a classification by the lessees as independent contractors. At no time has the DOL argued nor has the Ninth Circuit held that those findings of fact were clearly erroneous and therefore not binding on the determination of employment status. This court should therefore

remand this case to the Ninth Circuit with instructions to reinstate the trial court's final decision.

III. The Standard For Determining Employee Status Within The Meaning of the Fair Labor Standards Act Is So Inconsistently And Unpredictably Applied, As Evidenced By The Ninth Circuit's Decision In This Case, That It Should Be Redefined.

Employment status under the FLSA is a concept which has continually provoked dispute since the enactment of the statute and which has never lent itself to a precise test. In practice, the definition set forth by this Court nearly 40 years ago in *Rutherford Food Corp. v. McComb*,[22] provides little assistance to courts examining established relationships to determine whether a person is an employee under the FLSA, and almost no guidance or predictability to individuals or businesses about to engage in a relationship as to whether the FLSA applies.

The FLSA was enacted as part of the social legislation of the 1930s "to protect this nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health."[23] Protection of interstate commerce was also a concern, and, through the Act, Congress sought to suppress "nationwide competition in interstate commerce by goods produced under substandard labor conditions."[24]

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[22] 331 U.S. 722, 730 (1947) (the determination of the relationship depends upon the circumstances of the whole activity).

[23] *United States v. Rosenwasser*, 323 U.S. 360, 361 (1945) (quoting S. Rep. No. 884, 75th Cong., 1st Sess. 4 (1937)).

[24] *United States v. Darby*, 312 U.S. 100, 123 (1941).

In its first opinions construing the various acts of social legislation, however, this Court made clear that it was never the intent of Congress "to impose an arrangement upon the parties,"[25] nor to include those "who, without any express or implied compensation agreement, might work for their own advantage on the premises of another."[26] Rather the laws impose "upon the courts the task of finding out what the arrangement was."[27]

Since the *Rutherford* decision, courts have identified factors to help in distinguishing employees from independent contractors, but it is clear that the presence or absence of a single factor is not dispositive, and certain factors may be more important in one situation than in another.[28] Moreover, it is not necessary that findings be made with regard to each of the factors in order to determine the existence of an employment relationship.[29]

At the outset, it is the trial court's responsibility to examine the evidence and make factual findings, and then to make a decision of whether as a matter of economic reality the individuals being considered are dependent upon the business of another. Several circuit courts have held that the ultimate determination of employment status is a legal one.[30] In principle, there is

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[25]*Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944).

[26]*Rutherford*, 321 U.S. at 728-29 (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947)).

[27]*Skidmore*, 323 U.S. at 137.

[28]*Hickey V. Arkla Indus., Inc.*, 699 F.2d 748, 751-52 (5th Cir. 1983) (degree of control; opportunities for profit or loss; investment in facilities; permanency of relationship; and skill required).

[29]*Id.* at 752.

[30]*See, e.g., Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984); *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983); *Castillo v. Givens*, 704 F.2d 181, 187 n. 12 (5th Cir. 1983).

no disagreement that subsidiary facts underlying that determination are subject to the clearly erroneous standard on review,[31] and appellate courts are bound by a trial court's findings with regard to the particular factors related to employment status unless they are left with the distinct and compelling impression that a mistake has been made.[32] In practice, however, appellate courts have not always abided by this procedure.

It is clear that the determination of employment status under the FLSA rests upon factual findings made on a case-by-case basis. By holding that the ultimate determination is a legal one the role of the appellate courts has become confused, and the DOL has been able to disregard adverse factual findings in seeking relief on review. This case demonstrates the error that may result when the appellate court does not subject the trial court's findings to the clearly erroneous standard and treats the issue of employment status solely as a matter of law. By defining the issue on appeal as merely a legal one the DOL avoided the burden of proving that the trial court's findings were not substantially justified, and the Ninth Circuit was able to disregard the trial court's *Final Opinion* in making its holding. This result undermines the established principles requiring deference to the role of the trier of fact.

This Court has not explicitly stated whether the determination of employment status is a legal one. In *Goldberg v. Whitaker House Cooperative,*[33] where this Court most recently dealt with the issue of employment

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[31] *Paul v. Petroleum Equipment Tools Co.*, 708 F.2d 168, 170 (5th Cir. 1983).

[32] *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

[33] 366 U.S. 28 (1961).

status, the decision was split 5-3 that certain individuals were employees. The majority did not state that its determination was a legal one, but relied upon the homework provision in the Act to conclude that the cooperative members were covered. The dissenting justices argued that the finding of the district court, that the cooperative was created and being operated as a true cooperative, must be accepted by the Court unless it was clearly erroneous.[34] Because the majority was able to rely on a particular amendment to the FLSA to find employment status, the issue of what standard is correct in making and reviewing a determination of employment status has not actually been decided by the Court.

A comparison of a recent Sixth Circuit decision with the Ninth Circuit decision in this case[35] illustrates that the issues of the applicable standard for employment status and the manner in which the factors are applied are far from settled. In *Donovan v. Brandel*,[36] the Sixth Circuit emphasized that the inquiry of whether workers are employees subject to the FLSA must be made on a case-by-case basis, with a thorough examination of the unique factual record of the particular case. Although the DOL did not challenge factual findings on review, the Sixth Circuit examined those findings and determined that the record supported them with regard to each of the factors considered. As required by Rule 52(a) of the Federal Rules of Civil Procedure, the appellate court treated the findings as binding unless clearly erroneous.

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[34]366 U.S. at 33 (Whittaker, J. with Brennan, J. and Stewart, J. dissenting).

[35]Although the Ninth Circuit ordered that the disposition of the present case be by memorandum, foregoing publication, it still must be considered the law of the Ninth Circuit. *See Ninth Circuit Opinion* at A-2.

[36]736 F.2d 1114 (6th Cir. 1984).

In concluding that, based upon the record and the court's factual findings, the workers were not economically dependent upon the landowner's business, the Sixth Circuit rejected the DOL's attempt to seek a *per se* rule that all migrant farm workers are employees subject to the FLSA.

Unlike the Sixth Circuit, the Ninth Circuit proceeded in this case without due regard to the factual findings of the trial court's *Final Opinion*. Instead of going back to the comprehensive record to determine whether the findings were clearly erroneous, the Ninth Circuit disregarded the diversity of business enterprises engaged in by the lessees, ignored the agreement between the parties, and in effect made factual findings *de novo*. In holding that the lessees at issue were employees, the Ninth Circuit cited other cases involving self-service gasoline stations, indicating that it was giving effect to the DOL's attempt to make a *per se* rule that all self-service gasoline operators are employees subject to the FLSA.

Further, a comparison of the decisions made by the Sixth and Ninth Circuits illustrates the absence of universal qualities in defining and identifying the status of individuals under the FLSA. The same person could be performing the same act at the same time under the same conditions and be considered an employee in one circuit and not in another. This possibility breeds ambiguity and confusion.[37] This Court should therefore provide guidance as to what factors should be considered and how they should be applied in determining whether an employment relationship exists within the meaning of the FLSA.

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[37] *Cf. EEOC v. Zippo Mfg. Co.*, 713 F.2d 32 (3d Cir. 1983) (Third Circuit discusses difficult task facing courts in attempting to determine employee status for purposes of various federal statutes).

Town Pump maintains that the question of employment status is primarily a factual determination and must be treated as such by reviewing courts. If the issue is regarded as a legal one, the role of the trial court will continue to be usurped by appellate courts' disregard for the factual determinations of the trier of fact.

The issues in this case are important not only to Town Pump but to other businesses in the retail petroleum products business. This industry has undergone substantial changes in its marketing concepts, moving from traditional company operated gasoline stations to self-service pumps associated with convenience stores or other business enterprises. These changes have necessitated the establishment of new business relationships. As the courts have articulated and applied the various factors relevant to employment status, there is no way for private citizens to predict at the outset of a relationship whether it will be subject to the FLSA. Citizens may not rely on determinations of other federal agencies, and the courts themselves do not agree on the manner in which the standards are to be applied in determining employment status. The appellate courts are venturing further and further into the realm of the trial court and the facts of a particular case have become less and less significant.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,	)	
Plaintiff-Appellant,	)	CA No. 83-4313
vs.	)	DC No. CV 78-0031
TOWN PUMP, INCORPORATED, a corporation,	)	MEMORANDUM*
Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Montana
William D. Murray, District Judge, Presiding
Argued and submitted August 10, 1984

Filed August 27, 1984

Before: PECK, WRIGHT and FARRIS, Circuit Judges.

We agree with the Secretary of Labor that the district court erred in failing to consider significant factors in its determination that the operators are not employees under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* *See Real v. Driscoll Strawberry Associates,* 603 F.2d 748, 754 (9th Cir. 1979).

The district court relied on Town Pump's lack of supervision of the operators and the fact that the operators were free to engage in other business at the

stations. Whether an employer-employee relationship exists depends "upon the circumstances of the *whole* activity." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (emphasis added). The employer's degree of control over business operations is not conclusive in determinations of employment status under the FLSA. *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308, 1311 (5th Cir.), *cert. denied*, 429 U.S. 826 (1976). Neither is the fact that the operators are free to engage in other businesses. "[T]he test is not what the 'agent' could do but in fact what the 'agent' does do." *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1371 (9th Cir. 1981) (quotation omitted).

Generally we would remand the case for further fact findings on the factors ignored by the district court. *See Driscoll*. We find it unnecessary to do so here, however, because the district court's detailed findings of fact, made after the first trial, are sufficient for us to rule on the issue. The court found that the operators have no investment in the gasoline business, that the operators remain on the job as long as they continue to meet the requirements set by Town Pump, that the operators' retail sale of gasoline is an integrated part of Town Pump's business, and that the operators are dependent upon Town Pump for continued employment.

The record is sufficient for us to hold that the operators considered by the district court are employees. *See e.g., Marshall v. Truman Arnold Distributing Co.*, 640 F.2d 906 (8th Cir. 1981); *Donovan v. Williams Oil Co.*, 717 F.2d 503 (10th Cir. 1983).

The judgment of the district court is remanded for a determination of the extent of the violations and damages.

REVERSED and REMANDED.

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing [sic] publication in the *Federal Reporter*, and that this memorandum may not be cited in or by the courts of this circuit.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor, Plaintiff, vs. TOWN PUMP, INCORPORATED, A Corporation, Defendant.	)	MEMORANDUM and FINDINGS OF FACT and CONCLUSIONS OF LAW NO. CV—78-31-BU

This is an action for a permanent injunction, back wages, and liquidated damages brought by the Department of Labor (DOL).

The case first came on for trial on June 17, 1980. DOL presented testimony and depositions of six witnesses regarding their employment status. The defendant did not present any testimony and the court found that the six were employees under the Fair Labor Standards Act of 1938, and ordered DOL to submit calculations of hours worked and wage and overtime amounts owed within 30 days of the order.

The DOL failed to submit such calculations until the case came on for further trial in September, 1982.

The court having considered all the evidence and testimony submitted at the two sessions of the trial of the case and the briefs of counsel, and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law.

As a result of all the testimony and evidence presented to the court the findings of the court with reference to the first six witnesses will be re-examined.

That re-examination together with a review of all the testimony and evidence leads the court to conclude that the plaintiff has failed to sustain its burden of proving that the operators of the stations were employees. On the contrary the court finds that the relationship between the operators and the defendant was that of independent contractors.

The testimony of the operators that the defendant required them to be open and servicing the public approximately 15 hours a day seven days a week is not credible. The operators in the main had to admit that representatives of the defendant only seldomly visited the stations and there was no evidence that they otherwise checked on the hours of operation. On the other hand there was testimony from some of the operators that the defendant only recommended what hours to keep open. And this testimony was supported by that of the officers and representatives of the defendant. If the defendant required the stations to be open 15 hours a day surely there would be constant checks on the hours of operation.

Aside from the question of hours to keep open there was no evidence of supervision of the operators that would be the natural and regular system in an employer-employee relationship.

The operators were free to and, in fact, encouraged to engage in additional businesses at the stations. These business activities varied and there is no evidence that defendant in any way attempted to control them or to participate in the profits of such activities.

Plaintiff makes much of the defendant's requiring

the operators to deposit proceeds and payment for gas purchased to defendant's account but this, it seems to the court, is quite reasonable and compatible to the independent contractor relationship in view of the credit extended by defendant to the operators. This was not such control as to indicate an employer-employee relationship.

In connection with the question of the relationship between the parties the existence of the lease and lease letter must be considered. While it is true that the intent of the law cannot be evaded by a sham, here we have documents which announce a relationship and which is compatible with all the other credible evidence establishing an independent contractor relationship.

Under the terms of the lease many operators engaged in substantial other business. That some did not does not detract from the fact that the opportunity was there. And even the government recognized that some of the operators were of such a nature as to establish the independent contractor relationship. The operators conducted various businesses in conjunction with the gas stations. These businesses were as varied as grocery, candy and pop to used car-sales lots, fly-tying and a surveyor's office. One operator ran a marine supply shop and another a bus terminal facility.

I need not recite all the evidence to establish that the plaintiff failed to prove its case. On the contrary all of the evidence establishes the position of the defendant that the relationship between defendant and operator was that of independent contractor.

From all of this it is clear that defendant and its officers and agents clearly and reasonably considered a lessor-lessee relationship to exist between the defendant and the operators.

Even if the court did not find that the plaintiff failed to prove its case it is clear from all the evidence that the plaintiff did not establish a pattern from which this court could infer that all non-testifying operators were employees or improperly compensated.

The court having found that the operators were not employees entitled to damages we do not reach the question of liquidated damages or overtime.

In addition to the above findings of fact and conclusions the court finds that it has jurisdiction of this case and the parties by virtue of 29 U.S.C. 216(c), 29 U.S.C. 217 and 28 U.S.C. 1345.

Defendant Town Pump, Incorporated, is a corporation with its principal place of business located at 600 South Main Street, Butte, Montana, where it is engaged in distributing gasoline and petroleum products.

The petition for a permanent injunction is denied and there are no back wages or liquidated damages due.

Let judgment be entered for the defendant.

Done and dated this 28th day of September, 1983.

W. D. Murray
Senior United States District Judge.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,	)	
Plaintiff,	)	MEMORANDUM and
vs.	)	ORDER
TOWN PUMP, INCORPORATED, a corporation,	)	No. CV-78-31-Bu
Defendant.	)	

BACKGROUND

This is an action for a permanent injunction, back wages and liquidated damages brought by the Secretary of Labor under the provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201, *et seq*. Defendant, Town Pump, Inc., is a corporation with its principal place of business at 600 South Main Street, Butte, Montana, where it is engaged in distributing gasoline and petroleum products. The court's jurisdiction

is invoked under 29 U.S.C. 216(c), 29 U.S.C. 217 and 28 U.S.C. 1345.

The case involves the application of the minimum wage and overtime provisions of the FLSA to the operators of gasoline service stations subject to restrictive lease agreements with defendant Town Pump, Inc. The court finds that the operators were employees within the meaning of the FLSA and, therefore, subject to the minimum wage and overtime provisions of the Act, all as more fully set out in the Findings of Fact and Conclusions of Law filed separately today.

Deposition testimony

Trial of the case was had to the court on June 17 and 18, 1980. At trial, plaintiff produced the testimony of two persons who operated Town Pump service stations under the terms of a "lease" entered into between defendant and those persons. Testimony of four other operators was introduced through depositions which were offered at trial and admitted over defendant's objection by order of the court on February 26, 1981.

Defendant was granted time within which to submit evidence to rebut the depositions, which it did by way of deposition testimony. Plaintiff objected to most of the deposition testimony of Thomas P. Kenneally, Daniel Kenneally and Thomas F. Kenneally on the grounds that it was not rebuttal, and that it was irrelevant and prejudicial. While plaintiff's objections are sound, it has failed to specifically object to portions of the deposition. The court cannot rule in a general fashion and therefore must admit the depositions.

IT IS THEREFORE ORDERED and this does order that the depositions of Daniel J. Kenneally, Thomas F. Kenneally and Thomas P. Kenneally be admitted into evidence.

Back pay for persons who did not testify

As set out in the separately issued Findings of Fact and Conclusions of Law, defendants are and have been in violation of the FLSA and will be required to pay back wages and overtime to those operators who testified either at trial or by way of depositions. Plaintiff had attempted to prove violations of the FLSA as to almost all Town Pump stations and operators in Montana, even though no testimony was presented as to those operators. Thus, there was presented no proof upon which the court could make a finding of fact that the remaining operators performed any work upon which claims for back wages could be based. See, *Marshall v. Truman Arnold Distr. Co.*, 640 F.2d 906, 910-11 (8th Cir. 1981).

Plaintiff will be required to present testimony with regard to the hours worked by each operator should it choose to pursue those claims. Defendant, of course, will have the opportunity to cross-examine and rebut. This will be done at a later date.

Back pay for those operators who did testify

The current amount of back pay and damages owed by defendant cannot be determined by the court. Plaintiff has been ordered to provide its calculations as to hours worked and amount owed to those operators who testified; Challes, Crowley, Garner, Breeden, Hawk and Savage. Once those calculations have been submitted, the court will enter judgment, assessing both back wages and damages against defendant.

Done and dated this 6th day of October, 1981.

W. D. Murray
Senior United States District Judge.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor, Plaintiff, vs. TOWN PUMP, INCORPORATED, a corporation, Defendant.	FINDINGS OF FACT CONCLUSIONS OF LAW and O R D E R No. CV-78-31-Bu

This cause came on regularly for trial before the court, sitting without a jury, on the 17th day of June, 1980. The plaintiff was represented by Donald R. McCoy, Esq., Office of the Solicitor, Department of Labor, Denver, Colorado, and the defendant was represented by its counsel D. L. Holland, Esq.; thereupon oral and documentary evidence was introduced by and on behalf of each of the parties, and at the close of all of the evidence the parties rested and thereafter, within the time granted by the court, each of the parties filed their briefs and

proposed Findings of Fact and Conclusions of Law, and the cause was then submitted to the court for its consideration and decision. The court having considered all of the evidence and testimony submitted at the trial of the cause and the briefs of counsel, and being fully advised in the premises, now makes and orders filed its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. This is an action for a permanent injunction, back wages and liquidated damages, brought by the Secretary of Labor under the provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.* Jurisdiction of the court is invoked under 29 U.S.C. 216(c), 29 U.S.C. 217 and 28 U.S.C. 1345.

2. Defendant Town Pump, Incorporated, (hereinafter Town Pump) is a corporation with its principal place of business located at 600 South Main Street, Butte, Montana, where it is engaged in distributing gasoline and petroleum products.

3. Since May 1, 1975, and continuing to the present, defendant has had employees engaged in commerce including employees handling, selling or otherwise working on goods that have been moved in or produced for commerce.

4. Since May 1, 1975, Town Pump has distributed and sold gasoline through 56 "Town Pump" gasoline service stations.

5. Nine of these stations, those designated on plaintiff's Exhibit 1 as Anaconda #1, Butte #1, Butte #2, Bozeman #1, Browning, Deer Lodge, Dillon, Great Falls and Kalispell are owned directly by Town Pump. The remainder are owned by 47 separate corporations.

6. Town Pump is wholly owned by its president, Thomas F. Kenneally, and members of his immediate family as are the other 47 corporations. His son, Thomas P. Kenneally, is an accountant who has worked in a managerial capacity for Town Pump since

December, 1976. His other sons, Dan, Jim and Kevin Kenneally are "field men" employed by Town Pump to deal with the operators of the various other stations.

7. All but two of the retail gasoline stations are operated pursuant to "leases" which are similar in their terms to plaintiff's Exhibit 8, an agreement dated January 18, 1974, between Town Pump and Mrs. Judy Challes, the operator of Anaconda #1.

8. The stations identified as Butte #1 and Polson were excluded from consideration in plaintiff's investigation because each has a substantial independent grocery business and a *bona fide* rental payment associated with it.

9. Plaintiff's Exhibits 33-36 are lease agreements with four other stations. Three of the four stations these latter agreements pertain to are owned by corporations other than Town Pump. The named "lessor" in each of them is, however, Town Pump.

10. Each agreement purports to lease to the named operator a self-service gas station with living quarters attached, for a period of one year, "at the monthly rental of one cent (1 cent) per gallon of gasoline delivered by the lessor to the lessee."

11. Each agreement recites that the lessee (operator) shall maintain the premises "in good order, condition and repair." Each "may be cancelled at any time by the lessor" on 30 days notice or on 24 hours notice if the "lessee continues in possession" after the expiration of the lease.

12. Paragraph 21 of the agreement states "that the lessee is an independent contractor and not an agent or employee of the company."

13. The Challes lease carries the additional notation in paragraph 21 that "Hours of operation must be comparable to similar businesses in the area." It is otherwise typical of the leases for all 54 stations which are at issue.

14. Mrs. Challes testified at trial that she and her husband had operated Town Pump #1 at Anaconda,

Montana, since February 2, 1974. She "sent in an application" and was interviewed by Lee Eversen of Town Pump. Before she signed the contract, Eversen told her "that we would have free rent and utilities and that we had the contract there. We could read it over and we would get one cent per gallon as a commission."

15. In addition, Challes testified that "They told us the hours would be open from 7 to 11. If there was any price change in the gas, they would notify us. And they told us whether it would go up or down and we were to change the pumps and change the sign."

16. Mrs. Challes executed a bonding agreement for which she put up her 1973 Chevrolet van and camper trailer as security.

17. Besides specifying the hours of operation and the retail price of the gasoline, Town Pump required daily and weekly bookkeeping reports on forms which it supplied. On these forms, Mrs. Challes recorded pump readings, dollar sales and gallonage daily and made weekly reports of total gallonage, cash and credit receipts, bank deposits and tank inventory to Town Pump.

18. She also was told by Everson to deposit each day's receipts to a bank account in the name of Town Pump, Inc. from which she could make no withdrawals.

19. A number of the weekly reports are in evidence as plaintiff's Exhibit 31. Mrs. Challes was told how to fill them out by Tom Karagin, a Town Pump representative. The first of these for the period January 9-16, 1977, is typical. It shows $4,179.86 in total sales for the week and 7199.1 total gallons sold. Thus, Mrs. Challes earned a commission of $71.99 which she was told to calculate by converting the gallons to dollars and cents and which she deducted from the last bank deposit of the week.

20. She was further instructed to enter this amount as "Station Rent" under the heading "Dealer Owes Town Pump". She then multiplied this rent figure by two and subtracted it from the total sales for the week to arrive at

the "Payment on Gas" figure. Finally, she would add "Station Rent" and "Payment on Gas" to arrive at the total amount ($4107.87 in this example) "that we were supposed to have into the bank for Tom Kenneally. This amount is equal to the total sales less the $71.99 commission.

21. The weekly report form also required a listing of each day's bank deposits and that they be balanced against the amount listed under "Dealer Owes Town Pump." Mrs. Challes was required to make up any shortages and was responsible for bad checks or other losses.

22. During the week of January 9-16, 1977, used as an example, Mrs. Challes and her husband operated the station for seven days, 16 hours per day and earned $71.99. They remained open the hours specified by Town Pump (7 a.m. to 11 p.m.) each day until about two years prior to the trial when she "got permission" from Town Pump to close at 10 p.m.

23. Her husband operated the station for about two hours each day to enable her to shop and make her bank deposits. Otherwise, she was required to be on the premises, waiting on customers, doing bookkeeping, cleaning the building and its public bathrooms, dipping the tanks and performing similar duties.

24. Besides gasoline, she sold other items such as cigarettes, candy, pop, ice, motor oil and gasoline additives independent of Town Pump and to her own credit which she estimated at about $5.00 per week.

25. Mrs. Challes testified that she was told she would receive a commission of one cent per gallon, and "this was the way it was, the wages." Gas was delivered 1-2 times per week by Town Pump. She signed for deliveries of gasoline except for night deliveries. No one ever discussed with her the wholesale price of the gasoline and she did not understand that there was any transaction whereby she purchased it, as the following testimony on cross-examination by counsel for defendant (Mr. Holland) shows:

Q. Did Mr. Eversen explain to you that you would have to pay for the gas?
A. That I would have to pay for the gas?
Q. Town Pump would sell you the gas and then you would have to pay them for the gas?
A. No, I never understood it that way.

26. Mrs. Challes has nothing to do with retail prices either, other than to change the pumps and sign to reflect the price dictated to her by Town Pump representatives. As she stated: "I never had no say about it. They would tell me to put it up, I would have to put it up."

27. The station business license, grocery license and petroleum license were all in the name of Town Pump #1, signed by Tom Kenneally and sent to Mrs. Challes in the mail.

28. Testimony similar to that of Mrs. Challes was given by Mrs. Lavona Crowley, who, with her husband, operated Town Pump #5 in Butte, Montana, from February 15, 1979, through the present. This station is one which is owned by a Kenneally corporation other than Town Pump. However, like other in evidence, the lease agreement shows Town Pump, Inc. to be the lessor.

29. Mrs. Crowley applied to Town Pump in response to a newspaper advertisement similar to plaintiff's Exhibit II, which recites that "no cash investment is required." Her compensation was explained to her by Town Pump's Field Representative Dan Kenneally: "We would receive a cent a gallon on our gas commission."

30. There was a sign on the premises "saying our hours was from 7 to 10" and she and her husband maintained those hours until September, 1979.

31. She was, moreover, told by Dan Kenneally, "it would be a full time job. We are both there and one or the other of us had to be there at all times during the business hours."

32. She and her husband split their working time about evenly. They, as did Mrs. Challes, made daily bank deposits, made out the weekly reports and deducted one

cent per gallon as their commission. Until the contract was changed in April, 1980, they also paid $5.00 per week to Town Pump toward their bond.

33. Originally, the Crowleys were informed by Town Pump of changes in the retail price of gas, but then got permission from Dan Kenneally to simply follow the changes in price at a Gasomat Station down the street.

34. They carry no insurance on the station and, like Mrs. Challes, received the business licenses in the name of Town Pump #5 through the mail. They are responsible for bad checks and driveaways. They are generally open from 7 a.m. to 8 p.m. (13 hours daily) seven days a week. Sales average 500-700 gallons per day so that their commissions average $5-$7 daily.

35. Bertha Garner and her husband operated a Town Pump station on Excelsior beginning in 1972 to December, 1972, and operated another station on Montana Street in Butte from December 1972, to April 1977, and then in August 1977 operated Town Pump #9 in Butte. She was paid "a penny a gallon" commission at all three locations.

36. Her hours at Town Pump #9 were approximately 7 a.m. to 10 p.m. This location, like others, had a sign in the window (facing the operator) stating "minimum hours 7:00 a.m. to 10:00 p.m.," "turn off the lights during daylight hours," "keep the driveways clean" and "make daily bank deposits." Either Mrs. Garner or her husband were required to be on the premises during hours of business.

37. Although they sold items other than gas, such sales "wouldn't amount to $2.00 per day," according to Mrs. Garner.

38. The Garners were responsible for bad credit, checks and driveaways. All gas was furnished by Town Pump. Mrs. Garner stated that "with the Town Pump's help" she and her husband set the price of gas. However, shortly before her deposition in March 1979, "they come and told us that the Government had asked a raise there," and Town Pump employees actually change the signs for them when there is a price change.

39. Merlin Hawk testified by way of deposition. He operated Butte #8 in March, 1979 when his deposition was taken. He was told by Dan Kenneally when he took over the station that he would receive one cent per gallon for gasoline sales and 7 cents per gallon for diesel sales. He was further told that the company would like the station to be open from 7:00 a.m. to 10:00 p.m. Those were his actual hours, seven days per week. He never discussed the value of the premises with Kenneally or the fact that an amount designated as "rent" would be paid.

40. Mr. Hawk put it "I was needing a job right at the time and that was the only thing that came open."

41. Hawk also was responsible for depositing the daily receipts in Town Pump's account. Town Pump maintained the premises. Hawk carried no insurance and hired no employees because it would "cost more money than what we make." His typical receipts for items other than gasoline netted him a little over $2.00 per day.

42. Regarding prices to be charged for the gasoline he was given a specific price per gallon by Town Pump to charge and the signs were changed by "one of the Kenneally boys."

43. Alice Savage also testified by deposition. She operated Butte #2 and had previously been the operator at a Great Falls Town Pump station. At both locations her method of compensation was the same: "We got a penny a gallon on what we sell."

44. The station was open daily from 6 or 7 a.m. to 10 p.m. and she and her husband split the work about evenly.

45. She and her husband turned in the same weekly reports as did all other operators who testified, and also made bank deposits daily to an account belonging to Town Pump.

46. Regarding the price to be charged for the gasoline, Mrs. Savage testified as follows:

> Q. Do they set the price of the gasoline that you sell?

A. Yes.
Q. The company does?
A. Yeah.
Q. How are you ordinarily informed of a change in the price?
A. They call us up.
Q. They just call you and tell you what the new price is, is that right?
A. Yes.
Q. And then you change the pumps and the sign?
A. Well, Kevin comes down and does that, Kevin Kenneally.

47. Cloella Breeden testified by deposition that she had operated Butte #3 since November 16, 1977. She was told by Town Pump's representative that "I would get a commission off the gas, one penny to a gallon." The representative, a Mr. Harvey, "said there'd be long hours that we would work and he said that would be from 7:00 to 10:00 at night . . . seven days a week.

48. She was also instructed to make bank deposits daily and that she would be responsible for bad checks. A sign in the station when she started contained instructions regarding daily deposits, hours from 7-10, and turning off the lights during the day and on at dusk.

49. The station licenses were in Thomas Kenneally's name and Town Pump maintained the premises.

50. Mrs. Breeden testified she was "there constantly" during the hours of 7-10.

51. Mrs. Breeden testified that the company would call periodically and ask her to measure the tank levels. Depending on the level, Town Pump would come and fill the tanks. The retail price of the gasoline was set by the "Kenneally's." She was not usually informed of changes in price in advance, and in fact stated "I was at my daughter's one day and they changed it."

52. Another operator, Paul Orr, testified in rebuttal as to the extent to which the main office controlled the station operators: He operated the Town Pump stating [sic] in Browning, Montana, from September 1976, through March 1979, and in Columbia Falls from March 1979, through March 1980. He was in contact with field representatives of Town Pump "almost every day."

53. His hours of operation at both locations were 7-10. The field man told them these were the hours and there was a sign with "instructions we were supposed to follow," regarding the hours to remain open and making daily bank deposits. The sign was at both locations and he had seen one as well at the Kalispell station.

54. Plaintiff's Exhibit 32 demonstrates the full extent and specificity of Town Pump, Inc.'s instructions to its operators. These instructions were posted at the stations. Among other things the instructions required that "Dealer invoices must be done as of the *close of business on the last day of the time period.* Stick tanks, read the pumps and pull your money at the close of the day. This must *not* be done the day before, the day after, or during the day. At the close of the business day only." Similarly, "Your days receipts must be *deposited* in the bank *each and every day.* This office will be calling your bank to verify that your deposit is made each day." (Emphasis in all cases in the original).

55. Defendant's business and pay practices were investigated beginning in April 1977, by Donald E. Lundhagen, a Compliance Officer of the Wage and Hour Division, United States Department of Labor. Mr. Lundhagen testified at trial.

56. On April 14, 1977, he went to the main office of Town Pump, Inc. and asked for the president or manager. He was directed to "Tom, Jr.," Thomas *P.* Kenneally who is the son of the president, Thomas *F.*, and who was identified to him as the vice-president.

57. Lundhagen was directed also to an individual identified as the Office Manager, from whom he obtained

documents and statements as to the operation of the Town Pump stations.

58. In the course of his investigation he visited all 10 stations in Butte, 2 in Anaconda, 2 in Bozeman and 2 in Missoula, interviewed the operators at each, photographed the stations and examined the living quarters.

59. Lundhagen also examined the operator's weekly reports at each station he visited, verified the method and amount of compensation and reviewed copies of the lease agreement to see if they differed from the sample given him by Town Pump which he found to be typical. Where these documents were unavailable at the stations, he returned to the home office to examine them there.

60. Of the stations Lundhagen visited, each had a "Town Pump" sign, each was very similar in appearance and each had exactly the same record keeping forms. The records were all maintained at the main office in Butte.

61. The stations Lundhagen visited did not vary in their posted hours of business which, uniformly were 7:00 a.m. to 10:00 p.m.

62. The office manager related that two stations, Butte #1 and Polson, operated differently than the rest. After further investigation verified this, Lundhagen excluded them from consideration.

63. Lundhagen reviewed his investigation findings with Tom Kenneally, Jr., on April 25, 1977, at a closing conference when he informed him that the Department of Labor considered the operators to be employees.

64. Lundhagen further determined from examining sales records that until January 1, 1977, most of the stations were exempt from the minimum wage and overtime provisions under §13(a)(2) of the Fair Labor Standards Act, but that all were subject to them thereafter.

65. From the company sales records for each station for 1977 (Plaintiff's Exhibits 12 and 13) he com-

puted the amount of underpayment under the minimum wage and overtime provisions. Using 105 hours per week as the approximate number of hours for each station, he divided these hours evenly between the two operators, i.e., husband and wife who operated the stations.

66. On this basis, each operator would be due at least 52 1/2 hours at the applicable minimum wage plus additional 1/2 time for 12 1/2 hours under the overtime provisions. In 1977, this weekly amount was $270.26 for the two operators per station.

67. From this minimum amount he subtracted the one cent per gallon actually received at each station *plus* one cent per gallon as the stated "cost" of the housing (Tr. 135).

68. Plaintiff has proved its case only with regard to operators Challes, Crowley, Garner, Breeden, Hawk and Savage. The current hour and wage calculations are not readily available to the court and will be ordered submitted.

69. Violations, if continuing up to the date of this order, will result in back wages for 1981 being due.

From the foregoing Findings of Fact the court draws the following

CONCLUSIONS OF LAW

1. The court has jurisdiction of this case and the parties.

2. Defendant admits that its annual dollar volume exceeds $250,000 and that it has employees handling goods in or produced for commerce. It is therefore a covered enterprise engaged in commerce or in the production of goods for commerce within the meaning of Section 3(s)(1) of the Fair Labor Standards Act, hereinafter FLSA.

3. An enterprise is defined by the FLSA as follows:

Section 3***
(r) 'Enterprise' means the related activities performed (either through unified operation or common control) by any *person or persons* for a common business purpose, *and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units* including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor . . . (emphasis added).

4. Related activities for purposes of §3(r) are those which are the same or similar, *Hodgson v. University Club Tower, Inc.*, 466 F.2d 745 (10th Cir. 1972). The operation of self-service gasoline stations all of which are similar in appearance and function and are operated in similar fashion constitutes activities which are related within the meaning of the FLSA.

5. Regardless of which corporation owns it, each of the stations sells gasoline distributed by defendant Town Pump, at a price set by Town Pump and at the direction of its representatives. Weekly sales reports are sent to Town Pump on forms it supplies. Each day the cash receipts are deposited to Town Pump's account, and accounting is done at the central office in Butte, Montana. All gasoline purchasing and distribution is controlled from there. Detailed operating instructions are given to the station operators and enforced by defendant's management. Unified operation and common control within the meaning of Section 3(r) are clearly present.

6. Regardless of ownership of the stations, each operator who testified was recruited, interviewed, instructed and supervised by a Town Pump field representative. Each of these field representatives are employees of Town Pump. Prospective operators are told by newspaper ads to apply to Town Pump and Town

Pump is the lessor on most of the leases in evidence, even of stations it does not own. Common control of all stations by defendant Town Pump is therefore established within the meaning of Section 3(r).

7. The organizational structure is both "horizontal, as in chain stores" and "vertical, as in the manufacture and disposition of a particular product." Although defendant does not manufacture the gasoline, it purchases and distributes it to its retail outlets. This satisfies the common business purpose test, *Hodgsen v. University Club Tower, supra; Wirtz v. First National Bank and Trust Company,* 365 F.2d 641 (10th Cir. 1966); *Brennan v. Arnheim and Neely, Inc.,* 410 U.S. 512 (1973).

8. The business activities of defendant Town Pump, including those activities at the 54 service stations at issue here, constitute a single enterprise for purposes of Sections 3(r) and 3(5)(1) of the FLSA, unless performed by *bona fide* independent contractors.

9. The employment relationship which the FLSA defines is a comprehensive one:

> Section 3. As used in this Act . . .
>
> (d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee.
>
> (e) 'Employee' includes any individual employed by an employer.
>
> ****
>
> (g) 'Employ' includes to suffer or permit to work.

10. From the Supreme Court's decision in *Rutherford Food Corporation v. McComb,* 331 U.S. 722 (1947), the following indicia of independence have been extracted, see e.g. *Usery v. Pilgrim Equipment Co.,* 527 F.2d 1308 (5th Cir. 1976), *cert. den.,* 429 U.S. 826, and *Marshall v. Truman Arnold Distr. Co.,* 640 F.2d 906 (8th Cir. 1981).

1. The nature and extent of control retained by the alleged employer.

2. The alleged independent contractor's investment in facilities.
3. His opportunity for profit and risk of loss.
4. The permanency of the relationship, and
5. The amount of initiative, skill and judgment required for the success of the claimed independent enterprise.

11. Another pertinent factor is the extent to which the services in question are an integral part of the alleged employer's business, *Shultz v. Mistletoe Express Service, Inc.*, 434 F.2d 1267 (10th Cir. 1970).

12. For the purposes of the FLSA, an independent contractor is one who is in business for himself; an employee is not in business for himself, but dependent upon finding employment in the business of another. *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 301-302 (5th Cir. 1975).

13. Courts must look to the economic realities to determine if an employment relationship exists. *Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748 (9th Cir. 1979). Application of these factors to the facts shown at trial compel the conclusion that the station operators are employees of defendant.

14. **Control.** The company has complete control over every significant aspect of the business. Town Pump determines the location of its stations, requires that the operators live on the premises, and will not allow the sale of any gasoline but its own. The company determines the retail price of the gasoline and will not allow price changes without its permission. The company requires periodic sales reports on its forms and daily deposits of receipts to its account. The company maintains sales and receipts records at its central office and makes deductions for losses and shortages as it sees fit.

15. Defendant maintains that its operators have some discretion to set their own hours of business. Such discretion is illusory. The commission method of payment virtually requires the operators to maintain long hours. In fact, the evidence shows that Town Pump virtu-

ally requires that each station be open 15 hours per day and allows only minor flexibility as to opening and closing times.

16. **Investment.** The operators have none. The defendant advertises that no cash investment is required. The facilities and equipment are owned and maintained by defendant, except for minor repairs. While the written agreements recite rental payments, set at one cent per gallon sold, that is not actually paid out but is merely a deduction from the operator's gross receipts.

17. The licenses for gasoline sales at each station are in Town Pump's name and obtained by the company, as are government gasoline allocations, as well as retail and grocery licenses.

18. Each operator's "investment" in his inventory of sideline items such as cigarettes and candy is minimal compared to the overall cashflow of the business and is inconsequential in assessing the dependence of the operator upon defendant. *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297 (5th Cir. 1975).

19. **Profit and loss.** Under the commission arrangement, no one but defendant has an opportunity for profit in the true sense of the word: return on capital. Nor do the operators bear the risk of loss of venture capital. The fact that defendant holds them responsible for bad checks and other shortages simply demonstrates their true function as little more than cashiers in defendant's business organization.

20. **Permanency.** The operators remain on the job for as long as they like provided they meet the requirements set by Town Pump. None of them has anything resembling a business or organization capable of offering the same services to distributors other than defendant, see *Usery v. Pilgrim Equipment*, 527 F.2d 1308 (5th Cir. 1976). They are dependent upon Town Pump for continued employment.

21. **Initiative.** Defendant makes much of the fact that each operator can increase his commission by selling more gasoline and encouraging repeat customers. Salesmanship, however, cannot be equated with business initiative and judgment. As in *Pilgrim Equipment, supra,* Town Pump controls "[all] major components open to initiative" most importantly, pricing and the choice of distributors with whom to deal. The only "initiative" required is provided by the economic necessity to the operator of keeping the station open some 15 hours a day, seven days a week.

22. Finally it is clear from the evidence that the retail sale of gasoline as performed by the operators is "an integrated part of [Town Pump's] business," *Shultz v. Mistletoe Express Service,* 434 F.2d 1267 (10th Cir. 1970). Town Pump "distributes" several million gallon [sic] of gasoline annually to the stations in question. Its gross profits are almost wholly governed by the difference between the wholesale price it pays for the gasoline and the price at the pump, less overhead which includes the one cent per gallon commission paid to the operator.

23. When the economic realities of defendant's business relationship with its operators are examined in light of the above factors it is evident that the operators are employees within the meaning of Section 3(e) of the FLSA and that defendant Town Pump is their employer within the meaning of Section 3(d) of that Act.

24. It is immaterial that not all of the time spent on the job by the operators is spent "working." Readiness to serve may be hired to the same extent as service itself. *Armour & Co. v. Wontock,* 323 U.S. 126 (1944).

25. It is also immaterial that the defendant may have convinced its station operators that they were independent contractors by stating so in the lease and by other communication. The defendant's attempt to affix the name of "independent contractor" to the operators will avail it little in ascertaining the true nature of the relationship for FLSA purposes. *Mednick v. Albert Enterprises, Inc.,* 508 F.2d 297 (5th Cir. 1975).

26. Continuing violations of Sections 6 and 7 of the FLSA since at least January 1, 1977, and unpaid minimum wages and overtime compensation in substantial amounts were shown. Therefore, the Secretary is entitled to an injunction and back wage recovery regardless of any argument by defendant that it did not believe it was violating the Act, *Shultz v. Mistletoe Express, supra.* Such relief is remedial rather than punitive in nature and the purpose is "to correct a continuing offense against the public interest," *Shultz v. Mack Farland & Sons Roofing Co.*, 413 F.2d 1296, 1302 (5th Cir. 1969); *Wirtz v. Malthor, Inc.*, 391 F.2d 1 (9th Cir. 1968).

27. Where, as here, the employer has failed to maintain records of hours worked, in violation of Section 11 of the FLSA, defendant cannot defeat plaintiff's claim for back wages merely by showing that the evidence lacks the precision it would have if detailed records were kept. Plaintiff has shown the minimum extent of work performed by the operators as a matter of "just and reasonable inference," which is sufficient to shift the burden to defendant of coming forward with precise evidence that fewer hours in fact were worked, *Anderson v. Mt. Clemens Pottery,* 328 U.S. 680 (1946); *Dunlop v. Johnson Waste Materials, Inc.*, 78 CCH Labor Cases, par. 33,287 (S.D. Tex. 1975).

28. The defendant presented no evidence regarding the operator's hours of work and failed to rebut the plaintiff's evidence that all were open 15 hours per day or more, seven days a week. Damages based upon the approximate amounts computed by plaintiff may be awarded under Sections 16(c) and 17 of the FLSA. *Mt. Clemens Pottery, supra.*

29. The defendants are entitled to credit for the commission paid the operators and for the value of the living quarters provided the operators. *Marshall v. Truman Arnold Distr. Co., Inc.*, 640 F.2d 906 (8th Cir. 1981).

30. Liquidated damages under Section 16(c) of the FLSA are to be awarded unless defendant can meet its burden of showing to the satisfaction of the court that it

had reasonable grounds to believe it was in compliance, Section 11 of the Portal to Portal Act, 29 U.S.C. 260. The court will require the submission of further evidence on the issue of defendant's good faith belief, and will reserve ruling on the issue of liquidated damages.

31. Since January 1, 1977, defendant has violated and is violating the provisions of §§5 and 15(a)(2) of the FLSA by paying to its employees, for their employment in an enterprise engaged in commerce or the production of goods for commerce, wages at rates less than Two Dollars Thirty cents ($2.30) per hour after December 31, 1976; Two Dollars Sixty-Five cents ($2.65) per hour during the year beginning January 1, 1978; Two Dollars Ninety cents ($2.90) per hour during the year beginning January 1, 1979; and Three Dollars Ten Cents ($3.10) per hour during the year beginning January 1, 1980.

32. Defendant has violated and is violating the provisions of §§7 and 15(a)(2) of the FLSA by employing its employees in an enterprise engaged in commerce or in the production of goods for commerce for workweeks longer than 40 hours since January 1, 1977, without compensating said employees for their employment in excess of 40 hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed.

33. As a result of these violations unpaid minimum wages and overtime compensation are owing from defendant to its operators Challes, Crowley, Garner, Breeden, Hawk and Savage for the period from January 1, 1977, through December 31, 1979.

34. As to the remaining stations and operators, the plaintiff has failed to prove its case and must submit testimony with regard to the hours worked by operators of these stations. See *Marshall v. Truman Arnold Distr. Co., Inc.*, 640 F.2d 906 (8th Cir. 1981).

35. Insofar as the violations are continuing, additional amounts have accrued since January 1, 1980, for defendant's operators who were so employed since that date.

36. A judgment granting recovery is specifically authorized by §16(c) of the FLSA.

37. Defendant, an employer subject to the provisions of the FLSA, has violated and is violating the provisions of §§11(c) and 15(a)(5) of the FLSA, in that since January 1, 1977, it has failed to make, keep and preserve records of its said employees and of the wages, hours and other conditions and practices of employment maintained by defendant, as prescribed by the regulations promulgated pursuant to §11(c) at 29 C.F.R. 516.

IT IS THEREFORE ORDERED and this does order that judgment shall be entered in favor of plaintiff, pursuant to §17 of the FLSA permanently enjoining and restraining defendant, its officers, agents, servants, employees, and those persons in active concert or participation with defendant who received actual notice thereof from violating the provisions of §§15(a)(2) and 15(a)(5) of the FLSA.

IT IS FURTHER ORDERED that judgment be entered pursuant to §16(c) of the FLSA, against defendant and in favor of plaintiff for unpaid minimum wages and overtime compensation in an amount to be determined for the operators Challes, Crowley, Garner, Breeden, Hawk and Savage.

IT IS FURTHER ORDERED that plaintiff submit calculations of hours worked and wage and overtime amounts owed by defendant to the operators set forth above within 30 days of the date of this order. This amount is to be credited with a proper amount to compensate for the fair value of the living quarters provided to the operators and the amount previously paid the operators through the one cent per gallon commission.

Done and dated this 6th day of October, 1981.

W. D. Murray
Senior United States District Judge.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor, Plaintiff-Appellant, v. TOWN PUMP, INCORPORATED, a corporation, Defendant-Appellee.	CA No. 83-4313 DC No. CV 78-0031 (Montana) ORDER November 23, 1984

Before: PECK*, WRIGHT and FARRIS, Circuit Judges.

Appellee's petition for rehearing is denied.

*Hon. John W. Peck, United States Court of Appeals for the Sixth Circuit, sitting by designation.

APPENDIX B

Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201-219

§ 203. Definitions

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2) [relating to an individual employed by a public agency] and (3) [relating to individuals employed by a relative engaged in agriculture] the term "employee" means any individual employed by an employer.

(g) "Employ" includes to suffer or permit to work.

§ 215. Prohibited acts; prima facie evidence

(a) [I]t shall be unlawful for any person — —

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title.

(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

§ 216. Penalties; civil and criminal liability, injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision.

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a

period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

§ 217. Injunction Proceedings

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

28 U.S.C. § 1291. Final Decisions of District Courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States,

the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1345. United States as Plaintiff.

Except as otherwise provided by act of Congress the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Office - Supreme Court, U.S.
FILED
APR 12 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1345

In the Supreme Court of the United States

OCTOBER TERM, 1984

TOWN PUMP, INCORPORATED, PETITIONER

v.

SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

Cases:	Page
Bonnette v. *California Health & Welfare Agency*, 704 F.2d 1465	5
Castillo v. *Givens*, 704 F.2d 181, cert. denied, No. 83-135 (Oct. 3, 1983)	5
Donovan v. *Brandel*, 736 F.2d 1114	5, 6
Donovan v. *New Floridian Hotel, Inc.*, 676 F.2d 468	5
Donovan v. *Trans World Airlines, Inc.*, 726 F.2d 415	5
Donovan v. *Williams Oil Co.*, 717 F.2d 503	7
Marshall v. *Truman Arnold Distributing Co.*, 640 F.2d 906	7
Mednick v. *Albert Enterprises, Inc.*, 508 F.2d 297	6
Rutherford Food Corp. v. *McComb*, 331 U.S. 722	6, 7, 8
Usery v. *Pilgrim Equipment Co.*, 527 F.2d 1308, cert. denied, 429 U.S. 826	7

Statutes and rule:	
Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*	1
§ 15(a)(2), 29 U.S.C. 215(a)(2)	3
§ 15(a)(5), 29 U.S.C. 215(a)(5)	3
Fed. R. Civ. P. 52(a)	5

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the court of appeals' determination that the operators of petitioner's gasoline service stations are employees within the meaning of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

1. Petitioner Town Pump, Incorporated (Town Pump) is a Montana corporation owned by its president and members of his immediate family (Pet. 2). Petitioner has been engaged since May 1, 1975 in the business of distributing gasoline and petroleum products to 56 self-service gasoline stations, generally known as "Town Pump" service stations (Pet. App. A12). All of these stations are owned by petitioner or by other corporations that are owned by

petitioner's president and members of his immediate family (*ibid.*; Pet. 2).

Fifty-four Town Pump stations are operated pursuant to substantially similar lease agreements in which petitioner is the named "lessor" (Pet. App. A13, A21). The lease agreements purport to lease to the operator a Town Pump service station, together with the attached living quarters, at a monthly rental of one cent per gallon of gasoline delivered to the station by Town Pump (*id.* at A13). Petitioner holds all of the stations' necessary business licenses and petroleum allocations in its own name (*id.* at A16, A17, A19). It is the exclusive distributor of gasoline and petroleum products for each station, and it determines the retail price at which the products are sold (*id.* at A14, A18, A19, A20, A23, A25). Moreover, the Town Pump service stations are similar in appearance and function, and are operated in a similar manner pursuant to instructions and advice from Town Pump representatives (*ibid.*).

The stations are open seven days a week, for approximately 15 hours per day (Pet. App. A14, A16, A17, A18, A20, A21). The station operators complete daily reports on forms provided by petitioner, and make daily deposits to bank accounts belonging to petitioner (*id.* at A14, A18, A21). The operators withhold their commission of one cent per gallon from the last daily deposit for each week, and account for the commission on a weekly report completed on a Town Pump form. The form requires the station operators to balance the amount owed to petitioner (the retail sales less the operator's commission) against their total deposits for each week. *Id.* at A14, A16, A18, A23, A25. The operators are responsible for any shortages, and for bad checks or other losses (*id.* at A15, A17, A19).

The lease agreements provide that the operators are independent contractors and not agents or employees of petitioner (Pet. App. A5, A13). The agreements permit the operators to engage in other businesses on the leased premises, and some operators do engage in such businesses (*id.* at A5).

2. The Secretary of Labor commenced this action in the United States District Court for the District of Montana to enjoin petitioner from violating the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) and to compel payment of back wages to the operators (Pet. App. A12). The testimony of six operators was submitted at a trial on June 17, 1980, together with numerous documentary exhibits, including the lease agreements of six non-testifying operators (*id.* at A8). On October 6, 1981, the district court issued a memorandum opinion, together with 69 findings of fact and 37 conclusions of law (*id.* at A7-A30). The court found that the operators had been employees of petitioner since January 1, 1977, and were subject to the minimum wage and overtime provisions of the FLSA (*id.* at A29-A30). The court entered judgment in favor of the Secretary restraining petitioner from violating Sections 15(a)(2) and (5) of the FLSA, 29 U.S.C. 215 (a)(2) and (5), and requiring petitioner to pay minimum wage and overtime compensation owed to the six employees who had testified at the trial (Pet. App. A30). The court declined to enter back pay awards for the remaining operators in the absence of testimony regarding the hours worked by the operators (*id.* at A9, A29).

Fifty-one operators testified in September 1982, as did Town Pump management employees and expert witnesses. On September 28, 1983, the district

court issued a memorandum opinion (*id.* at A3-A6). The court reversed its previous position, holding that the degree of supervision exercised by petitioner over the operators' hours and other business activities was insufficient to indicate an employer-employee relationship (*id.* at A4-A5). It found that "the relationship between the operators and the defendant was that of independent contractors" (*id.* at A4). The court entered judgment for petitioner as to all of the operators, including the six operators who had testified at the first trial (*id.* at A6).

The court of appeals reversed (Pet. App. A1-A2). It found that "the district court erred in failing to consider significant factors in its determination that the operators are not employees under the Fair Labor Standards Act" (*id.* at A1). In particular, the court of appeals concluded that the district court should not have made its determination solely on the basis of "Town Pump's lack of supervision of the operators and the fact that the operators were free to engage in other business at the stations" (*id.* at A1-A2). The court of appeals found it unnecessary to remand the case for further factual findings "because the district court's detailed findings of fact, made after the first trial, are sufficient for us to rule on the issue" (*id.* at A2). The court of appeals reviewed the characteristics of the relationship between petitioner and the station operators and concluded that "[t]he record is sufficient for us to hold that the operators considered by the district court are employees" (*ibid.*).

3. The decision of the court of appeals involves the application of well-settled legal principles to the particular facts of this case. It does not conflict with any decision of this Court or any decision of another court of appeals. Further review of this fact-bound issue is not warranted.

Moreover, the decision of the court of appeals is correct. Petitioner's principal contention (Pet. 10-13) is that the court of appeals acted as "an original fact finding tribunal" (*id.* at 13) in concluding that the service station operators were employees within the meaning of the FLSA. However, the court of appeals did not engage in fact finding; it simply applied the appropriate legal standard to the facts found by the district court.

Petitioner has confused the two different types of determinations made by the district court. That court first detailed its findings concerning the factual circumstances of the relationship between petitioner and the service station operators (see Pet. App. A4-A5, A12-A22). It then measured these facts against the FLSA's legal standard in order to determine whether the operators were "employees" within the meaning of the statute (*id.* at A5, A8, A24-A27). While the district court's findings regarding the facts underlying a determination of employment status are subject to review under the clearly erroneous standard (see Fed. R. Civ. P. 52(a)), the courts of appeals are in agreement that the determination whether an employee relationship exists is a question of law. *Donovan* v. *Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984); *Donovan* v. *Trans World Airlines, Inc.*, 726 F.2d 415, 417 (8th Cir. 1984); *Castillo* v. *Givens*, 704 F.2d 181, 185-188 (5th Cir. 1983), cert. denied, No. 83-135 (Oct. 3, 1983); *Bonnette* v. *California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983); *Donovan* v. *New Floridian Hotel, Inc.*, 676 F.2d 468, 471 n.4 (11th Cir. 1982).[1]

[1] In view of this unanimity among the courts of appeals, there is no basis for petitioner's assertion (Pet. 16-17) that this Court should address the standard of review applicable to this determination.

The court below followed this rule in reviewing the district court's determination. It did not disturb the district court's factual findings concerning the characteristics of the relationship between Town Pump and the operators.[2] It simply held that the district court had committed an error in its application of the FLSA's legal standard and, because the relevant facts were in the record,[3] the court of appeals proceeded to apply the legal test in a proper manner.

This Court has made clear that the determination whether a person is an "employee" under the FLSA depends not on "isolated factors but rather upon the circumstances of the whole activity." *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 730 (1947). Thus, the court of appeals correctly held (Pet. App. A1-A2) that the district court erred by making its determination solely on the basis of the degree of petitioner's control over the operators' hours and the operators' freedom to engage in other businesses. See *Mednick* v. *Albert Enterprises, Inc.*, 508 F.2d 297, 299-301 (5th Cir. 1975) (these factors not determinative because even individual who hires own employees and engages in other activities to increase compensation can be an employee under the FLSA).

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[2] Petitioner's suggestion (Pet. 18-19) that the decision of the court below conflicts with *Donovan* v. *Brandel*, 736 F.2d 1114 (6th Cir. 1984), therefore is incorrect.

[3] Petitioner argues (Pet. 7-9) that the court of appeals should not have relied upon the district court's initial findings of fact. However, the district court did not vacate its initial findings; it simply "re-examined" them (Pet. App. A4), made some additional findings (*id.* at A4-A5), and reached a different legal conclusion. Thus, the earlier findings remain valid provided they are not contradicted by factual findings in the later decision.

The court of appeals properly concluded that the operators were employees within the meaning of the FLSA based upon its more complete review of the characteristics of the operators' relationship with petitioner. The court of appeals relied (Pet. App. A2) upon the district court's findings "that the operators have no investment in the gasoline business, that the operators remain on the job as long as they continue to meet the requirements set by Town Pump, that the operators' retail sale of gasoline is an integrated part of Town Pump's business, and that the operators are dependent upon Town Pump for continued employment." See also Pet. App. A26-A27. Its determination is in accord with the decisions of other courts of appeals that cite similar factors in finding that the operators of retail stations were employees under the FLSA. See *Donovan* v. *Williams Oil Co.*, 717 F.2d 503, 504-505 (10th Cir. 1983); *Marshall* v. *Truman Arnold Distributing Co.*, 640 F.2d 906, 908-909 (8th Cir. 1981); *Usery* v. *Pilgrim Equipment Co.*, 527 F.2d 1308, 1310-1315 (5th Cir.), cert. denied, 429 U.S. 826 (1976).[4]

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[4] Petitioner erroneously asserts (Pet. 13-15) that the court of appeals was required to make a separate determination concerning the employee status of each service station operator. It is clear that a single determination can be made with respect to a group of similarly situated employees. See, *e.g.*, *Donovan* v. *Williams Oil Co.*, *supra*; *Marshall* v. *Truman Arnold Distributing Co.*, *supra*; *Usery* v. *Pilgrim Equipment Co.*, *supra*.

Petitioner suggests (Pet. 16-19) that this Court should reevaluate its decision in *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947), and establish a more specific test for ascertaining employee status under the FLSA. However, petitioner has presented no conflict among the courts of appeals warranting resolution by this Court. Moreover, the

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

FRANCIS X. LILLY
Solicitor of Labor

APRIL 1985

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limitless variety of factual situations in which this issue can arise would render impractical any standard other than the "circumstances of the whole activity" test set forth in *Rutherford Food Corp.*

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